

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
KEMP ENTERPRISES and  
KIEWIT CONSTRUCTION  
  
Appellants,  
  
v.  
  
PUGET SOUND AIR POLLUTION  
CONTROL AGENCY  
  
Respondent.

16386763  
PCHB No. 86-183

FINAL FINDING OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

This matter, the appeal of three civil penalties (Nos. 6482, 6483, and 6384) aggregating \$3,000 for alleged violations of regulations concerning asbestos removal, came on for hearing before the Pollution Control Hearings Board; Wick Dufford, Member (presiding), Lawrence J. Faulk, Chairman, and Judith Bendor, Member, on December 19, 1986, in Lacey, Washington. Respondent elected a formal hearing.

Appellant Kemp Enterprises was represented by Paul W. Kemp, owner. Appellant Kiewit Construction was represented by Gale DePriest, project superintendant. Respondent Puget Sound Air Pollution Control Agency was represented by Keith McGoffin, attorney at law. The proceedings were transcribed by Bibi Carter.

Witnesses were sworn and testified; exhibits were examined;  
argument was heard. From the testimony, exhibits and contentions of  
the parties, the Board makes these

#### FINDINGS OF FACT

##### I

This case involves misadventures surrounding the demolition of one  
of the several houses in Seattle which have been eliminated to make  
way for the enlargement of Interstate 90. The house in question was  
an older residence which once stood at 2412 So. Atlantic.

Kiewit Construction, Inc., was prime contractor for the job. Paul  
Kemp of Kemp Enterprises subcontracted to perform asbestos removal  
work.

##### II

Kiewit hired an asbestos consultant in connection with demolishing  
the houses. This consultant pre-surveyed the asbestos in the houses  
and properly filed a Notice of Intent to Remove or Encapsulate  
Asbestos with the Puget Sound Air Pollution Control Agency (PSAPCA).  
According to the notice, the house at 2412 So. Atlantic was to be  
demolished on Monday, May 19, 1986.

PSAPCA's inspector arrived at the house in the afternoon on  
Saturday, May 17, 1986, to inspect to ensure that all asbestos had  
been removed prior to demolition. He was accompanied by Kiewit's  
asbestos consultant.

### III

The inspector discovered the main removal job had been done, but dry fragments of what appeared to be asbestos-laden material remained in the basement, living room and second-story bedrooms. He took samples from the living room rug, a basement floor board and the doorsill of the north upstairs bedroom. All of these samples proved, on analysis, to contain asbestos.

### IV

The inspector informed the consultant that a Notice of Violation would issue based on his observations on the 17th. He also stated that demolition should not commence until all asbestos material had been removed from the house. The consultant said he would advise Kiewit. By the time the inspection ended, it was after 5:00 p.m. on a Saturday evening.

### V

The consultant did contact Kiewit's superintendent, who in turn, reached Kemp, the asbestos removal subcontractor, on Sunday, May 18, 1986. Kemp was instructed to get out to the site and remove the asbestos before the demolition subcontractors started to knock down the house. The demolition subcontractor was not contacted.

Early on Monday morning, May 19, 1986, before either Kemp or Kiewit talked to them, the demolition sub-contractors brought down the first wall. Almost immediately thereafter, Kiewit's superintendent learned what was happening, stopped the job and notified PSAPCA.

1 PSAPCA's inspector arrived, sized up the situation and produced  
2 another Notice of Violation. He then advised that the debris from the  
3 wall would be considered contaminated waste and should all be handled  
4 as though it were asbestos.

#### 5 VI

6 Later, during the day of May 19, 1986, Kiewit's consultant  
7 discussed procedures for the debris removal with the inspector and his  
8 supervisor in PSAPCA's office. The inspector then went back to the  
9 site and noted that the area was being roped off and that signs  
10 warning of asbestos hazard were being posted.

#### 11 VII

12 On May 20 1986, PSAPCA's inspector observed Kemp Enterprises'  
13 employees in the process of carrying out the removal of the debris  
14 from the demolished wall. No water was being used in the process of  
15 bagging the debris for disposal. Inspection of the bagged material  
16 showed no visible signs of its having been wetted. Another Notice of  
17 Violation resulted.

#### 18 VIII

19 On August 27, 1986, PSAPCA issued three amended Notice and Order  
20 of Civil Penalty documents (Nos. 6482, 6483 and 6484) to Kiewit  
21 Construction and Paul Kemp dba Kemp Enterprises.  
22

23  
24  
25  
26 FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND  
ORDER PCHB No. 86-163

The notices imposed penalties for asserted asbestos handling violations as follows:

<u>NOTICE</u>	<u>PENALTY</u>	<u>DATE OF VIOLATION</u>	<u>VIOLATIONS ALLEGED</u>
6482	\$1,000	5/17/86	1) Failure to adequately wet asbestos materials that have been removed and to keep wet until collected for disposal each working day. Section 10.04(b)(2)(iii)(A),(B)
			2) Failure to adequately wet and seal asbestos materials in lead-tight containers. Section 10.05(b)(iv)
6483	\$1,000	5/19/86	Failure to remove all asbestos materials prior to wrecking/dismantling of facility. Section 10.04(a)
6484	\$1,000	5/20/86	Failure to adequately wet asbestos materials that have been removed and to keep wet until collected for disposal. Section 10.04(b)(2)(iii)

Feeling aggrieved thereby, Kemp Enterprises and Kiewit Construction jointly appealed these orders to this Board on September 12, 1986.

#### IX

Kemp Enterprises' response to the violations asserted for May 17, 1986, was to advise the Board that the vast majority of the asbestos in the house had already been removed prior to that date, using the proper procedures for wetting materials, sealing materials in leak-tight bags and collecting them for disposal.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER PCHB No. 86-163

1 As to the violation asserted for May 19, 1986, Kemp disclaimed any  
2 involvement.

3 Concerning the violation alleged for May 20, 1986, Kemp maintained  
4 that the debris being bagged had been coated with a penetrant sealer  
5 which encapsulated any asbestos fibers during the handling process.  
6 PSAPCA's inspector stated that he was told at the time that a  
7 penetrant had been used, but was convinced by his inspection that this  
8 coating had not effectively sealed the material at the bottom of the  
9 six foot debris pile. It was the debris at the bottom of the pile  
10 which he observed being removed when he determined to issue a Notice  
11 of Violation on May 20th.

12 On this last point, we are persuaded to accept the inspector's  
13 version of the facts and find that asbestos-containing debris which  
14 was neither encapsulated nor wetted was being loaded into bags on May  
15 20, 1986.

16 X

17 Kiewit Construction, Inc., stated that the demolition which  
18 occurred on May 19, 1986, before all asbestos had been removed from  
19 the house, was a completely unintentional occurrence occasioned solely  
20 by an unfortunate breakdown in communications. Kiewit pointed out  
21 that significant efforts at compliance were expended throughout the  
22 job and that substantial time and money were invested in correcting  
23 the problems created by the untimely demolition on the 19th. By the  
24

25  
26 FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND  
ORDER PCHB No. 86-163

1 time the entire job was completed, the company maintained, the whole  
2 demolition area was completely free of asbestos and safe for the  
3 public.

#### 4 XI

5 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
6 adapted as such.

7 From these Findings of Fact, the Board comes to these

#### 8 CONCLUSIONS OF LAW

##### 9 I

10 The Board has jurisdiction over the subject matter and the  
11 parties. Chapter 43.21B RCW. The case arises under regulations  
12 implementing the Washington Clean Air Act, chapter 70.94 RCW.

##### 13 II

14 Asbestos is a substance which has been specially recognized for  
15 its hazardous properties. It is one of only six pollutants classified  
16 pursuant to Section 112 of the Federal Clean Air Act for the  
17 application of National Emission Standards for Hazardous Air  
18 Pollutants (NESHAPS). It is a substance which by legal definition

19 causes or contributes to air pollution which may  
20 reasonably be anticipated to result in an increase in  
21 mortality or an increase in serious irreversible, or  
incapacitating reversible, illness.

##### 22 III

23 The federal asbestos handling regulations have been adopted by  
24 reference by the Washington State Department of Ecology. WAC  
25

26 FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
27 ORDER PCHB No. 86-163

173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10, Section 10.01.

The provisions of Regulation I alleged to have been violated in the several penalty notices at issue are set forth in substance in Finding of Fact VIII above.

On the basis of the record made before us, we conclude that each of the violations asserted was committed, and that the issuance of penalties for these violations was proper under RCW 70.94.431.

#### IV

The Washington Clean Air Act is a strict liability statute and acts in violation of its implementing regulations are not excused on the basis of absence of intent, See, RCW 70.94.040, RCW 70.94.431. Kiewit, therefore, cannot rely on lack of intention to relieve it of liability.

#### V

Moreover, Kiewit as prime contractor, was a proper party to be included on all three penalty notices involved. Because of the factor of extraordinary, or "inherent" dangerousness we think the duty to meet asbestos handling requirements should be treated as non-delegable. Accordingly, we have held in asbestos cases, that this concept prevents the obligation to comply with applicable standards



from being contracted away. Federal Way School District #210 v. PSAPCA, (PCHB 86-164), January 28, 1987); See, Sea Farms, Inc. v. Foster & Marshall Realty, 42 Wn. App 308, 711 P.2d 1049 (1985). We adhere to this approach in the instant case.

#### VI

Kemp Enterprises was, we conclude, a proper party to be included in the penalties, assessed for violations on May 17, 1986 and May 20, 1986. But, we think it was an error to charge Kemp with the "premature demolition" violation of May 19, 1986.

Asbestos sub-contractor Kemp incurs liability for penalty based solely on its own acts, and not, like prime contractor Kiewit, as a result of the acts of others. Kemp was not involved in the demolition work on the project and had no obligations regarding it.

#### VII

As to the penalties for violations on May 17 and May 20, 1986, we decline to apportion the amounts. See, Brandel Construction, Lesley Construction and Balser Investments v. PSAPCA, PCHB 85-136, 141, 154 (November 27, 1985). To so decline is our usual practice, particularly where, as here, one of the parties is liable vicariously. The parties, therefore, are in the position of joint tortfeasors, jointly and severally liable for the two penalties.

#### VIII

The extraordinary dangerousness of asbestos supports the imposition of significant penalties for the violation of procedures

1 designed to protect against the hazard. This is true a fortiori in  
2 the instant case where lack of containment created the risk of  
3 exposure, not just to workers in the immediate area, but to the public  
4 at large.

5 In light of all the circumstances, we hold that the amount of  
6 penalty in each instance reasonable and should be upheld.

7 IX

8 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
9 adopted as such . ,

10 From these Conclusions, the Board enters this  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORDER

Notice and Order of Civil Penalty Nos. 6482 and 6484 are affirmed. Notice and Order of Civil Penalty No. 6483 is affirmed as to Kiewit Construction, Inc., and reversed as to Paul Kemp dba Kemp Construction.

DONE this 18th day of February, 1987.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Member

Larry Faulk 2/18/87  
LARRY FAULK, Chairman

Judith A. Bendor  
JUDITH A. BENDOR, Member

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER PCHB No. 86-163